In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-479

MICHAEL W. ALBANO,
PETITIONER,

v.

JORDAN MARSH COMPANY,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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BATEMAN & SLADE, INC., BOSTON, MASSACHUSETTS.

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Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

The petitioner, MICHAEL W. ALBANO, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts entered on June 28, 1977, at which time the court refused to grant further appellate review of the decision and judgment of the Appeals Court entered April 29, 1977.

Opinion Below.

The opinion of the Appeals Court is reported in Mass. Adv. Sh. (1977) 483 and is set forth in the Appendix hereto (pages 30a-35a).

Jurisdiction.

The decision of the Appeals Court for the Commonwealth of Massachusetts was entered April 29, 1977, and further appellate review was denied by the Supreme Judicial Court on June 28, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Questions Presented.

1. *Constitutional Question*: In a tort action wherein damages are claimed for malicious interference and loss of time, plus other damages for interference with rights of the plaintiff as to leases with other parties, and mental anguish, can a plaintiff be deprived of a jury trial by a summary judgment based on the theory of collateral estoppel on a judgment in a contract action not involving the same claims as in the tort action?

2. *Constitutional Question*: When the parties to a multi-action dispute, involving both tort and contract law, have agreed to set aside the tort phase for later trial, in consideration of the plaintiff's discontinuance of the claims in contract, can a defendant thereafter change its position and

move for summary judgment based on the theory of collateral estoppel by a judgment on the contract phase of the case?

3. Where the plaintiff submits a sufficient affidavit in opposition to a motion for summary judgment offering to introduce, as a part of the tort action, evidence that the defendant was conspiring to acquire wrongfully the property of the plaintiff, and that evidence is not controverted, can summary judgment be granted? (See App. 4a and 5a.)

4. Can a court void an agreement between two parties as to a trial, made in open court with approval by the court, and thereby deprive the plaintiff of a jury trial?

Constitutional Provisions.

Section 10, clause 1, of Article I of the Constitution of the United States specifies:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Section 1 of the Fourteenth Amendment to the Constitution of the United States specifies:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

This case involves a tort action, designated Hampden No. 123,384, based in part on *Albano* v. *Jordan Marsh Co.*, 354 Mass. 445 (1968). On March 19, 1971, the petitioner filed a petition for specific performance, Suffolk No. 93154. On July 12, 1971, the parties agreed in open court to eliminate counts I to V in Hampden No. 123,384, leave count VI in tort for later trial and go forward in Suffolk No. 93154. On April 12, 1973, Judge Brogna entered an order in Hampden No. 123,384 that "the Plaintiff may proceed on said Count Six, and further, that said Count Six states a cause of action separate and apart from" Suffolk No. 93154 (App. 10a). Suffolk No. 93154 was decided in favor of the respondent on June 4, 1973. The respondent amended its answer in Hampden No. 123,384 to include res judicata and collateral estoppel. The petitioner filed a petition under G.L. c. 211, § 4A, challenging the amendment. The Supreme Judicial Court (Mass. Adv. Sh. (1975) 1405) allowed the amendment, saying "[t]he attempt has served only to delay trial which was probably obtainable in June or September, 1974." *Id.* at 1411. The petitioner then filed counts VII and VIII and finally obtained an assignment for trial "within the first ten cases in April

1976." The respondent filed a motion for summary judgment. The petitioner filed an affidavit in opposition to the motion (App. 17a-24a). The parties by stipulation submitted all prior cases, pleadings, and briefs as a part of the motion. The respondent did not deny the petitioner's affidavit, did not file an affidavit or submit any evidence in support of its motion for summary judgment. It was allowed by Judge Greaney, who also disallowed count VIII, on April 15, 1976 (A. 24a-29a). The appeal was filed in the Appeals Court on October 19, 1976, and decided on April 29, 1977. A copy of that opinion is attached to this petition (App. 30a-35a).

The parties had agreed in court at a hearing before Judge Brogna in said Suffolk No. 93154 that if the petitioner should discontinue the contract counts one through five, in Hampden No. 123,384, the parties would leave count VI in tort for trial (App. 8a). Under this agreement, the petitioner also amended as part of the agreement Suffolk No. 93154, the case for specific performance, to eliminate from the complaint "the value of the tenants' leases and the income from said leases" as a further separation of the tort action from Suffolk No. 93154. The respondent assented to the motion. In pursuance of the agreement, petitioner also split the causes of action by eliminating counts one through five in contract (App. 6a, 9a).

In Suffolk No. 93154 the petitioner had avoided seeking damages for the value of the tenant's leases because of the agreement between the parties. He only introduced evidence to show he had the tenants, the contractor, and the financing had he been allowed to proceed; that Jordan Marsh was responsible for the failure of the project; and that he wanted the difference cost-wise in the event of specific performance or damages from Jordan Marsh. The petitioner had avoided seeking damages for the tenant leases because of the agreement between the parties and amended his pleadings before trial (App. 18a). He cannot be preju-

diced now for relying on the agreement made in open court; nor for withholding his tort evidence because of that agreement. The findings in Suffolk No. 93154 were not the product of full litigation and full deliberation as found by the Appeals Court (App. 33a). A reading of the transcript of the evidence (Exhibit E of the exhibits filed with the Appeals Court and the findings of the trial judge in Exhibit D) would establish that the findings were general, assumed and not based on specific evidence, and in some instances erroneous.

Reasons for Granting the Writ.

I. The Massachusetts Courts have Voided an Agreement between the Parties as to Trial, Refusing the Petitioner a Jury Trial as to Damages.

The Appeals Court based its finding to affirm the lower court's decision allowing the respondent's motion for summary judgment on conclusions of the lower court drawn from the decision of Judge Lynch and examined in *Albano* v. *Jordan Marsh Co.*, 2 Mass. App. Ct. _____ (1974), Mass. App. Ct. Adv. Sh. (1974) 569. The conclusions were not fully true or correct.

This was a tort action alleging that Jordan Marsh acted wrongfully and maliciously in refusing to grant an extension of time. The Hampden court said: "the allegation fails since the declaratory judgment decree expressly found that Jordan [Marsh] acted at all times in good faith . . ." (App. 26a). This is based on finding No. 3 of the final decree in Suffolk No. 93154 (Exhibit D, p. 143). The correct words are: "that respondent's decision to appeal from said decree

to the Supreme Judicial Court was based on competent legal advice and not in an effort to frustrate petitioner's right under the lease." In connection with this point, the Appeals Court said: "The finding that Jordan Marsh's determination to appeal from the 1967 Suffolk Superior Court decision was made in good faith, *while lacking direct support in the record*, was not erroneous. The very nature of the case (*Albano* v. *Jordan Marsh Co.*, 354 Mass. 445 [1968]) . . . justifies the inference of good faith." *Albano* v. *Jordan Marsh Co.*, Mass. App. Ct. Adv. Sh. (1974) 569, 576 (emphasis added). (Ex. 1, p. 13, lines 1 to 7.) Our question: Was that a necessary inference in view of the fact that the type of case warranted the appeal? *Besides, the Supreme Judicial Court assessed costs.* 354 Mass. at 448. The finding of good faith by Judge Lynch appears to be inconsistent with the assessment of costs by the Supreme Judicial Court in *Albano* v. *Jordan Marsh Co.*, 354 Mass. 445 (1968). The evidence in Hampden No. 123,384 was not in, was not before Judge Lynch in Suffolk No. 93154, was not before the Appeals Court in the petitioner's appeal (Ex. D), and the inference will be positively removed by the evidence to be presented in Hampden No. 123,384. Certainly, at this point, it cannot be found that "*at all times* [Jordan Marsh] acted in good faith" as erroneously claimed by the court in Hampden No. 123,384 (App. 26a). Mass. App. Ct. Adv. Sh. (1974) 569, 569-574. The Appeals Court followed the Hampden court and thereby reversed itself on this point.

The second of the Hampden court conclusions as used by the Appeals Court was: "To the extent that Albano's difficulties were caused by the suit over the Highway, caused inferentially by Jordan, the allegation fails since the declaratory judgment action found that Jordan played no part in instigating this litigation" (App. 26a-27a; 31a, n. 1).

There was positively no evidence before Judge Lynch either way. There was no basis for this finding. In the matter now being considered, the petitioner did file an affidavit in opposition to the motion for summary judgment which contained the following: "the plaintiff will introduce evidence tending to prove, and from which a Jury could find, that the defendant and its parent organization Allied Stores, Inc. of New York, entered into a secret arrangement and planned to deprive the plaintiff of his shopping center project and to secure the same at a nominal cost for their own profit to the damage of the plaintiff" (App. 20a). The petitioner did not introduce this evidence in Suffolk No. 93154 because of the agreement between the parties to try the tort action later (App. 18a). The many depositions listed in the Hampden docket were to be used with other evidence to support the petitioner's contention of the secret arrangement. The Hampden court judge did not consider the depositions and made no comment upon them.

Conclusion three of the Hampden court: "To the extent that the tort action depends on Albano's assertion that Jordan caused the other tenants to abandon their leases, the action fails since the prior action has found that Jordan played no part in causing the other tenants to cancel their leases" (App. 27a; 31a, n. 1). Again, this was assumed by Judge Lynch. There was no evidence to support this finding. The conduct of Jordan Marsh in refusing to recognize the actions of the taxpayers' petition blocking the road, and making the petitioner unable to perform, continually refusing an extension when legally obliged to give one (354 Mass. at 448), was discouraging to the other tenants. As to Filene's, the evidence was that Filene's would go forward as soon as Jordan indicated it would go forward.

Interference may be done by verbal act, by deed, by a failure to act when there was a duty to act, or by bringing

about a situation which would cause others to refrain from acting or acting wrongfully. Jordan was the prime tenant and was trying to avoid its lease. The Supreme Judicial Court assessed costs. The Jordan Marsh conduct was NEGLIGENCE, AT LEAST. See Suffolk No. 86858.

The Appeals Court quotes a small part of the pleadings in Suffolk No. 93154 (which was narrative) that "[a]s a result of [a] . . . course of action by [Jordan Marsh] . . . other tenants which [Albano] . . . had secured began to withdraw from the project" (App. 33a). It continues: "In its answer the defendant specifically alleged that Albano had 'disabled himself from performing . . . by allowing the cancellation of essential leases . . .'"; then says: "Those respective allegations, *we think*, served to raise in *Albano I* [Suffolk No. 93154] the precise issue now involved" (App. 33a) (emphasis added). The petitioner replies that Jordan Marsh caused the entire collapse of the project. How could he stop cancellation of leases in view of the acts of the principal tenant to avoid the project? In said Suffolk No. 93154 the Appeals Court also said in deciding that appeal: "Extensive portions of those [petitioner's] briefs are devoted to lengthy recitations of certain evidence, which, if considered separately or out of context, could tend to support findings of fact more favorable to the plaintiff's position." Mass. App. Ct. Adv. Sh. (1974) 569, 574-575. But the trial court did not consider that evidence (it made no findings on same); nor did the Appeals Court. That evidence had been introduced to show bad faith on the part of Jordan Marsh.

The petitioner should have an opportunity to present evidence to establish the truth of those issues. If the Appeals Court is in error, it constitutes a costly miscarriage of justice. The interests of justice would have been served by the Supreme Judicial Court ordering a hearing on the case.

It has been the petitioner's position consistently that the Supreme Judicial Court in the case of *Albano* v. *Jordan Marsh Co.*, 354 Mass. 445 (1968), held that Jordan Marsh breached the lease agreement by refusing to grant the extension in 1966. The good faith or lack of good faith by Jordan Marsh is completely immaterial on this point. It is sufficient in law to render the respondent liable to Albano for damages that Jordan Marsh refused to take the proper action in 1966 and to grant the extension regardless of its subjective motive. Jordan deliberately adopted a course of conduct to achieve a result and that action has been held wrongful. See, *e.g.*, *Restatement of Torts*, § 766, illustration 1, and comment d.

The Hampden court conclusion to the effect that Jordan did not have to grant an extension, and so interference did not exist, is based on the erroneous statement that Jordan acted throughout in good faith (App. 26a).

Before trial in Suffolk No. 93154, called *Albano I* by the Appeals Court, the parties in open court agreed to try this tort case after completing the issues of specific performance and the rights of the parties. The attorneys for the defendant on July 12, 1971, wrote to the petitioner: "Enclosed is a carbon of the Order we agreed upon. I shall submit it to Judge Brogna for his signature on Thursday unless I hear from you in the meantime. Mr. Ewing will sound out Allied about their interest or lack of it in the Springfield Mall site." Signed Michael B. Elefante for Hemenway & Barnes (App. 7a). The order called for the petitioner to waive counts I to V in Hampden No. 123,384 because they sounded in contract. The petitioner waived the said counts (App. 18a). The petitioner also: (1) "In paragraph 10 of the petition, petitioner moves to delete and strike the phrase 'and the rental from their leases'" and (2) "In paragraph 11 of the prayers, petitioner moves to delete the phrase 'the

project for 1969, 1970, 1971 and 1972' and substitute in place thereof 'Jordan Marsh for 1968, 1969, 1970 and 1971.'" This was agreed to by the respondent's attorney (App. 7a, 9a).

Subsequently, Judge Brogna ruled on count VI of the tort action: "ORDER. In connection with Court Order dated July 14, 1971, entered in the Suffolk Equity suit as Paper #5, with reference to Count Six in the proceedings entitled Michael W. Albano v. Jordan Marsh Company, Hampden County Superior Court #123,384, it is ordered that the plaintiff may proceed on said Count Six, and further, that said Count Six states a cause of action separate and apart from this suit (Suffolk No. 93154)." Signed Vincent R. Brogna, entered April 12, 1973 (App. 10a). Petitioner submits that this is the law of the case.

In any event, for the sake of argument, even if the two cases were for the same cause of action, which the petitioner expressly denies, the respondent consented to the petitioner's prosecuting both suits and the petitioner in reliance thereon waived counts I to V.

In this connection, by way of analogy, petitioner refers to *Restatement of Judgments*, § 62, comment on clause (c):

> "*Consent of defendant*. . . .
>
> "Where there are a number of items which constitute a claim, and the plaintiff brings an action to enforce the claim and includes all the items, it may be agreed between the parties that one or more of the items shall be withdrawn from the action with the understanding that the plaintiff is not precluded from subsequently maintaining an action based upon these items. In such a case if the items are withdrawn, the plaintiff is not precluded from subsequently maintaining an action based upon them."

The recent case of *Saraceno* v. *Peabody*, 1 Mass. App. Ct. 834 (1973), sets forth the elements which are determinative in testing a course of action for the conclusiveness of a prior judgment. Among these is whether or not the type of relief sought is the same. Without belaboring the point which has been referred to above, petitioner would simply point out that the relief sought in this case is wholly different and distinct and not the same as the equitable relief in the declaratory judgment action, Suffolk No. 93154. The issues involved in the present tort action were *not* actually raised, litigated, and carefully deliberated in the first case. Because of the agreement of the parties to try the tort phase later, the petitioner has been prejudiced by relying on the tort case for his damages in connection with the loss of other tenants. As to tenants, *the issue of damages from the wrongdoing of Jordan Marsh has never been tried.*

In addition to the secret arrangement to deprive the petitioner of his land, there is the matter of damages for loss of time, years of effort, and mental anguish. These are all part of the affidavit against the motion for summary judgment (App. 17a-24a). Count VI, moreover, while specifically listing many of the Triple A tenants discouraged and maliciously interfered with, also alleges "and other conduct by the defendant made it impossible for the plaintiff to honor his obligations . . ." (App. 5a). These issues must be tried.

WE CONTEND THE APPEALS COURT CANNOT VOID THE AGREEMENT BETWEEN THE PARTIES TO TRY THE TORT PHASE LATER. IT INVOLVES THE PETITIONER'S CONSTITUTIONAL RIGHTS AS TO CONTRACT AND TO A JURY TRIAL.

At this time we point out that no affidavit was filed by the respondent to support its contention of res judicata or estoppel. Respondent was allowed to amend to claim

res judicata and estoppel but no evidence was introduced to support its motion.

In the case of *Fabrizio* v. *U.S. Suzuki Motor Corp.*, 362 Mass. 873 (1972), the Supreme Judicial Court stated: "'Res judicata is an affirmative defense.' *Hacker* v. *Beck*, 325 Mass. 594, 598. The burden is on the party claiming res judicata by reason of a prior adjudication to allege *enough facts* in his plea or motion to establish that the cause of action was (1) between the same parties; (2) *concerned the same subject matter*; and (3) was decided adversely to the party seeking to litigate the subject matter again. [Cases cited.]" *Id.* at 873-874 (emphasis added).

At the outset, the nature of the proceedings in Suffolk equity case No. 93154 and in this case must be set forth. Case No. 93154 was a petition under G.L. c. 231A, § 1, for *declaratory relief, asking that the rights of the parties be declared under a certain lease agreement* with the respondent, and that *specific performance be ordered of that agreement.* The Appeals Court decision, *Albano* v. *Jordan Marsh Co.*, Mass. App. Ct. Adv. Sh. (1974) 569, describes the petition as one for declaratory relief seeking the determination of the rights of the parties under a lease. The Appeals Court ends its decision with the statement that: "in essence, Albano's efforts after 1968 were geared toward effecting a new lease with Jordan Marsh, and that there was no basis for the court to substitute a new lease for the old one and to order specific performance under such an agreement." *Id.* at 576. It is therefore incontrovertible that the fundamental ground for the proceedings in case No. 93154 was for determination of Albano's rights under the lease in the light of the events and for equitable relief by way of specific performance with appropriate equitable adjustments. In Judge Lynch's findings there is an express finding (No. 48) (Ex. D, p. 111) that an actual controversy

between the parties exists "warranting a declaration of rights under the lease" and all of his rulings of law are "under the lease."

Petitioner submits that count VI in this case, Hampden County No. 123,384, is in tort alleging that the respondent had maliciously interfered with the *petitioner's business relationship with others, including other leases or potential leases* of the proposed shopping center. Proposed counts VII and VIII are also in tort, count VIII in substance alleging an arrangement by the respondent to deprive petitioner of the shopping center site and count VII alleging malicious interference with the shopping center development. These were disallowed in the court below simultaneously with the finding of estoppel (App. 11a-14a, 29a).

FOR THE REASONS HEREAFTER SET FORTH, PETITIONER SUBMITS THAT THE DOCTRINES OF RES JUDICATA OR COLLATERAL ESTOPPEL HAVE NO APPLICATION TO THE PRESENT CASE.

The clear object and dominant purpose of the petition for declaratory judgment (No. 93154) was to seek a declaration of rights under the lease between the parties dated April 28, 1964, and for equitable relief by specific performance. The present case is in tort for malicious interference with petitioner's leases with others. The *Restatement of Judgments* asserts that declaratory judgments have no effect as a merger or bar. *Restatement of Judgments*, § 77, comment b (1942), in part says: "Where a plaintiff seeks a declaratory judgment he is not seeking to enforce a claim against the defendant. He is seeking rather a judicial declaration as to the existence and effect of a relation between him and the defendant. *The effect of the judgment, therefore, unlike a judgment for the payment of money, is not to merge a cause of action in the judgment or to bar it.* The effect of a declaratory judgment is rather to

make res judicata the matters declared by the judgment, thus precluding the parties to the litigation from relitigating these matters." (Emphasis added.) Albano was, in Suffolk No. 93154, seeking a judicial declaration as to the existence and nature of the lease between himself as landlord and the respondent Jordan Marsh as lessee. The *Restatement of Judgments*, on which the Massachusetts courts have long placed emphasis, specifically states that after such a declaration, regardless of the outcome, the plaintiff or defendant may pursue further *declaratory* or coercive relief in a subsequent action.

The Supreme Judicial Court in the case of *Sandler* v. *Silk*, 292 Mass. 493 (1935), has, in effect, anticipated the *Restatement* reasoning. In *Sandler* it was held that an action of *tort* for damages from a fraudulent mortgage foreclosure was not barred by a previous equity suit to have the mortgage *declared* void. There was no res judicata as to the *tort* action between the same parties even though (1) the causes of action arose out of related transactions and involved the same subject matter and (2) there were allegations and prayers in the equity suit that the foreclosure proceedings themselves were wrongful and should be voided.

It should also be reemphasized that case No. 93154 concerned a declaration as to the existence or termination of the lease and the rights of the parties under it.

II. The Petitioner has been Denied a Jury Trial by Means of a Summary Process Motion Granted in Spite of Disputed Facts.

With regard to the binding nature of any findings by Judge Lynch under the petition for declaratory judgment,

the long recognized rule stated by Lummus, J., in *Cambria* v. *Jeffery*, 307 Mass. 49, 50 (1940), is controlling:

> "A fact merely found in a case becomes adjudicated *only* when it is shown to have been a basis of the relief, denial or relief, or other ultimate right established by the judgment." (Emphasis added.)

Without an exhaustive analysis of the findings at this point, petitioner submits that findings such as No. 36, "that Jordan's decision to appeal from the adverse decree of Suffolk Superior Court was made in good faith," and No. 37, "that Jordan played no part in inducing Albano's tenants to leave," cannot have been the basis of the declaration of rights under the lease or any other ultimate right of the parties to the litigation. See dissenting opinion of Whittemore and Cutter, JJ., and of Kirk, J., in *Home Owners Federal Sav. & Loan Assn.* v. *Northwestern Fire & Marine Ins. Co.*, 354 Mass. 448, 456-457-461 (1968). Such findings cannot have been the basis of the relief declared for Jordan Marsh and against the petitioner under the lease.

AS A COROLLARY TO THE BASIC POSITION SET FORTH IN THIS ARGUMENT, PETITIONER SUBMITS THAT:

The tort is founded on the protection of the petitioner's right to enjoy the benefit of the obligations owed him under his existing contracts, of his privilege to engage in free enterprise, and of his right to enjoy business relations. The petitioner is entitled to enjoy his rights and privileges without their being unlawfully invaded. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229, 251 (1917).

Interference with the existing rights under a contract or otherwise interfering with its performance without legal justification is an actionable tort positively different from an action for a breach of contract. A judgment in neither

action is res judicata of the other. *Gentile Bros. Corp.* v. *Rowena Homes, Inc.*, 352 Mass. 584, 591 (1967).

"The obligations of a contract are impaired by . . . [an action] which renders them invalid, or releases or extinguishes them . . . and impairment . . . has been predicated of . . . [actions] which without destroying contracts derogate from substantial contractual rights." *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 431 (1934). See also *Ogden* v. *Saunders*, 12 Wheat. 213, 354-355 (1827). Jordan Marsh, by its actions, not only impaired the obligations of its own contract with the petitioner, but also impaired those of Albano with the other tenants, and petitioner cannot be deprived of his right to prove such impairment and to seek redress in his tort action.

Conclusion.

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Massachusetts Appeals Court and the refusal of the Massachusetts Supreme Judicial Court to grant further review.

Respectfully submitted,

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COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS: SUPERIOR COURT
No. 123,384

MICHAEL W. ALBANO

v.

THE JORDAN MARSH COMPANY.

Plaintiff's Declaration.

Count I

The Plaintiff says that on April 28, 1964 he entered into a lease with the Defendant to construct for it a building and to construct a shopping center in which the Defendant was to be the major tenant; that the lease, a copy of which is hereto annexed and made a part hereof; and marked "Exhibit A", provided for extensions of time for either party for "unavoidable delays" said unavoidable delays being described as causes or delays "beyond the reasonable control of the party required to perform", that unavoidable delays did arise in connection with the construction of a certain section of a public highway called for by the lease; that the Defendant wrongfully denied the Plaintiff the extension of time to which he was entitled under said lease; that said denial of an extension of time by the Defendant made it impossible for the plaintiff to go forward; that as a consequence thereof the shopping center project failed and the plaintiff has suffered extensive damages, irrevocable damages and mental anguish, loss of time and money, all as alleged in his writ.

Count II

The Plaintiff says that on April 28, 1964 he entered into a lease with the Defendant, a copy of which is attached hereto and made a part hereof marked "Exhibit A"; that the Plaintiff had certain rights and benefits under said lease; that in connection with said lease the Plaintiff acted diligently and exercised due care but that the Defendant, its agents or servants, so negligently and carelessly conducted its responsibilities under said lease that the Plaintiff was delayed, expended large sums of money, lost years of work and effort, suffered extensive damages, was unable to construct a Regional shopping center, and was damaged as alleged in the writ.

Count III

The Plaintiff says that on April 28, 1964 he entered into a lease-contract with the Defendant, a copy of which is hereto annexed and made a part hereof marked "Exhibit A"; that the Plaintiff performed in keeping with his obligations and duties under said contract but that the Defendant, its agents or servants, did not honor the terms of said contract and did breach said contract and the Plaintiff lost a Regional shopping center project of extensive value, yearly incomes of substantial amounts of money, many years of diligent effort and expenditures, and other damages to his great damage.

Count IV

The Plaintiff says that on April 28, 1964 he entered into a lease with the Defendant, a copy of which is attached hereto and made a part hereof marked "Exhibit A", whereby the Plaintiff was to construct a Regional Shopping

Center in which the Defendant was to be the major tenant; that the Plaintiff honored his obligations under the lease but the Defendant, its agents or servants, intentionally and maliciously refused to grant the Plaintiff an extension of time as provided for in said lease; that as a consequence thereof the Plaintiff was unable to construct a Regional shopping center project and suffered other damages to his great damage as alleged in his writ.

Count V

The Plaintiff says that on April 28, 1964 he entered into a lease with the Defendant, a copy of which is attached hereto and made a part hereof marked "Exhibit A"; that said lease required the construction of a section of highway called the Outer-Belt Highway for the benefit of the Defendant; that a controversy arose in connection with the construction of said Outer-Belt Highway and taxpayers' proceedings were instituted to prevent such construction; that the lease provided for extensions of time to be granted to either party for causes or delays beyond the reasonable control of said party; that the Plaintiff in keeping with his rights under the lease requested an extension of time; that it was the obligation of the Defendant to grant such an extension of time; that the Defendant, its agents or servants, intentionally and with malice denied the extension of time needed by the Plaintiff in an effort to avoid its lease; that the Plaintiff sought relief in the Superior Court for this Commonwealth, sitting in Equity; that on September 1, 1967, there was a finding by said Court upholding the Plaintiff's position; that the Defendant again ignored the Plaintiff's rights and thereafter appealed to the Supreme Judicial Court of this Commonwealth; that on June 5, 1968 the Supreme Judicial Court confirmed the finding of the

Superior Court and assessed costs of Appeal against the Defendant; that after said final decision the Defendant refused to renegotiate any terms of the lease or to proceed with the Shopping Center program on some equitable basis which would have relieved the Plaintiff of the greatly increased construction and financing costs resulting from the Defendant's conduct and from delays caused by the Defendant; that as a result thereof the Plaintiff could not proceed with the shopping center project and had to forego his plans, expenditures, years of work, time and other damages, all to his great damage.

Count VI

The Plaintiff says that for a long period of time prior to April 28, 1964 and for a period of time after said date he planned to develop and construct a Regional Shopping Center on land that he owned in Springfield, Massachusetts; that on said April 28, 1964 he entered into a lease with the Defendant, a copy of which is hereto attached and made a part hereof marked "Exhibit A"; that Article IV, Section 5B and provisions of the lease with the Defendant required the Plaintiff to obtain other leases in certain business categories dictated by the Defendant; that in furtherance of these provisions the Plaintiff did obtain valuable leases with Montgomery Ward of Chicago, Haynes & Company of Springfield, Bond Clothes of New York, Marianne Shops of New York, Peck & Peck of New York, Thom McAn of New York, Brown Shoe of St. Louis, Kinney Shoe of New York, F. W. Woolworth of New York and others; that in the natural course of events these aforesaid lessees would pay substantial sums as rent to the Plaintiff; further, the Plaintiff entered into commitments to lease and leases were drawn for signature with Filene's of Boston, Kennedy's of

Boston, and others; that the Defendant had full knowledge of the existence of said leases and commitments and knew that said leases and commitments were contingent upon Jordan Marsh fulfilling its obligations under its lease; that a situation beyond the control of the Plaintiff came about which called for an extension of time to be granted the Plaintiff, to which the Plaintiff was duly entitled under Article XXXV of the lease; that the Defendant wrongfully refused to grant an extension of time to the Plaintiff knowing that such a denial of time would prevent the project from going forward and would interfere with the fulfillment of the leases enumerated herein; that further, the Defendant let it be known throughout the shopping center industry that it would not grant an extension of time to the Plaintiff thus again interfering with the aforesaid contracts of lease; that this and other conduct by the Defendant made it impossible for the Plaintiff to honor his obligations under the existing leases, the Defendant's lease and other commitments; that the Defendant's conduct was malicious and without just cause and an interference with the Plaintiff's project and his leases; that said conduct and interference caused the Plaintiff's project to fail, caused the loss of the Plaintiff's leases and future tenants; caused disturbance, mental anguish and suffering to the Plaintiff; caused the Plaintiff great loss of time, earnings, monies and future earnings; and caused the Plaintiff extensive damages, all as alleged in his writ and declaration.

The Plaintiff,
MICHAEL W. ALBANO

Filed February 3, 1969.

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS. SUPERIOR COURT
No. 123-384

[Title omitted in printing.]

Plaintiff's Discontinuance of Certain Counts.

Now comes the plaintiff in the above entitled action and hereby discontinues Count One, Count Two, Count Three, Count Four and Count Five in said cause of action but specifically retains Count Six.

The Plaintiff,

by MICHAEL W. ALBANO, PRO SE

Filed September 24, 1971

EXHIBIT A.

July 12, 1971

Edward A. Counihan, Esq.
Counihan & O'Brien
191 Alewife Brook Parkway
Cambridge, Massachusetts 04138

Re: Michael W. Albano v. Jordan Marsh Company
Suffolk Superior Court Equity Number 93154

Dear Mr. Counihan:

Enclosed is a carbon of the Order we agreed upon. I shall submit it to Judge Brogna for his signature on Thursday unless I hear from you in the meantime. Mr. Ewing will sound out Allied about their interest or lack of it in the Springfield Mall site.

Sincerely,
MICHAEL B. ELEFANTE

EXHIBIT B.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
EQUITY No. 93154

[Title omitted in printing.]

Order.

The defendant's Plea in Abatement having been called for hearing on July 12, 1971, and the parties having agreed that the instant case is for the same cause of action as are counts 1-5 in Hampden Superior Court No. 123, 384, *Michael W. Albano v. Jordan Marsh Company*, an action at law, it is ordered that the plaintiff, Michael W. Albano, within 30 days hereof elect to dismiss either this Petition for Declaratory Judgment or the action at law. Should the plaintiff elect to dismiss the action at law, the election shall be limited to the first five counts and within the 30 day period the plaintiff shall submit to the Court a memorandum on the question whether Count 6 of the action at law should also be dismissed. Within a reasonable time after the receipt of such memorandum from the plaintiff, the defendant shall file a responsive memorandum. The Court shall make an appropriate order on the basis of those written memoranda.

BY THE COURT (Brogna, J.)
FRANCIS P. CONCANNON,
ASSISTANT CLERK

Entered July 14, 1971

EXHIBIT C.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
EQUITY No. 93154

[Title omitted in printing.]

Motion to Amend Petition for Declaratory Judgment.

Now comes the petitioner in the above action and moves that his Petition for Declaratory Judgment be amended in the following respects:

(1) In Paragraph 10 of the petition, petitioner moves to delete and strike the phrase "and the rental from their leases."

(2) In Paragraph 11 of the prayer, petitioner moves to delete the phrase "the project for 1969, 1970, 1971 and 1972" and substitute in place thereof "Jordan Marsh for 1968, 1969, 1970 and 1971."

By his attorneys,
COUNIHAN AND O'BRIEN
By: EDWARD A. COUNIHAN

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS. SUPERIOR COURT
No. 123384

[Title omitted in printing.]

Order.

In connection with Court Order dated July 14, 1971, entered in the Suffolk Equity suit as Paper #5, with reference to Count Six in the proceedings entitled Michael W. Albano v. Jordan Marsh Company, Hampden County Superior Court #123,384, it is ordered that the plaintiff may proceed on said Count Six, and further, that said Count Six states a cause of action separate and apart from this suit. (Suffolk 93154)

VINCENT R. BROGNA,
Associate Justice of the Superior Court

Entered: April 12, 1973

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS: SUPERIOR COURT
No. 123,384

[Title omitted in printing.]

Motion to Amend Declaration.

The Plaintiff moves to amend his Declaration by adding thereto the following Count in Tort, designated as Count VII, which Count VII is as follows:

Count VII

The Plaintiff says that before and during the years 1964, 1965, 1966, 1967, and 1968 he was the owner of a large tract of land situated at the northwest corner of Allen and Cooley Streets in Springfield, in this County; that in 1964 and prior thereto he planned a Regional Shopping Center project on said land; that during the years 1964, 1965, 1966, and 1967 he entered into leases with leading nationally recognized merchandising firms, chain store tenants, and others; that further, he had commitments from AAA chains and was negotiating with numerous satellite tenants to complete the full rental of the project; that the project was ready to go forward to a construction start by December of 1968 and again on several occasions thereafter; that the Defendant knew of the development, its tenants, the planned construction start, and was the major tenant in the project, but the Defendant, without just cause, maliciously interfered with the development, and by its conduct maliciously induced the tenants and the prospective tenants of the Plaintiff to withdraw from the development and to have no further relations with the Plaintiff in regard to said development;

WHEREBY the Plaintiff's development failed and the Plaintiff lost his tenants, the proposed satellite tenants, the value of his signed leases, the project as planned, the income from the project over a period of thirty-five (35) years, huge sums of money in expenditures, suffered irrevocable damages, mental anguish, and a great loss of time.

The Plaintiff,

by MICHAEL W. ALBANO

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss: SUPERIOR COURT
No. 123,384

[Title omitted in printing.]

Motion to Amend Declaration.

The Plaintiff moves to amend his Declaration by adding thereto the following Count in Tort, designated as Count VIII, which Count VIII is as follows:

Count VIII

The Plaintiff says that before and during the years 1964, 1965, 1966, 1967 and 1968 he was the owner of a large tract of land situated at the northwest corner of Allen and Cooley Streets in Springfield, in this County; that in 1964 and prior thereto he planned a Regional Shopping Center project on said land; that during the years 1964, 1965, 1966, and 1967 he entered into leases with leading nationally recognized merchandising firms, chain store tenants, and others; that further, he had commitments from AAA chains and was negotiating with numerous satellite tenants to complete the full rental of the project; that the project was ready to go forward to a construction start by December of 1966 and again on several occasions thereafter; that the Defendant knew of the development, its tenants, the planned construction start, and was the major tenant in the project, but the Defendant, and its parent organization, Allied Stores, Inc. of New York, New York, entered into a secret arrangement and planned, by illegal and improper means, to deprive the Plaintiff of his Shopping Center project, to secure the same at a nominal cost for their own profit and in furtherance of that purpose, refused to grant

an extension of time to the Plaintiff as provided for in the lease between the parties and this was done maliciously; that the Defendant and its parent well-knew that the refusal to grant an extension of time to the Plaintiff at the time the Plaintiff was in a position to perform, would cause the failure of the project.

WHEREBY the Plaintiff's development failed and the Plaintiff lost his tenants, the proposed satellite tenants, the value of his signed leases, the project as planned, the income from the project over a period of thirty-five (35) years, huge sums of money in expenditures, suffered irrevocable damages, mental anguish, and a great loss of time, as alleged in his Writ and Declaration.

The Plaintiff,

by MICHAEL W. ALBANO

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss. SUPERIOR COURT
No. 123384

[Title omitted in printing.]

Defendant's Motion for Summary Judgment.

The defendant, Jordan Marsh Company, moves for the entry of summary judgment in its favor. As reasons therefor Jordan Marsh Company asserts that in its answer it has set up the defense of the statute of limitations and res judicata or collateral estoppel and on the pleadings in this case and in the following cases, together with the records on appeal and the final decisions thereon which are contained and referred to in the documents submitted herewith by stipulation of the parties, there is no genuine issue as to any material fact within the period of the statute of limitations that was not, or in law might not have been, litigated in the prior proceedings or on which the plaintiff is not estopped from introducing evidence:

Michael W. Albano v. Jordan Marsh Company, Suffolk Equity No. 86858; SJC Equity No. 7069; 254 Mass. 445; 238 N.E. 2d 52 (1968)

Michael W. Albano v. Jordan Marsh Company, Suffolk Equity No. 93154; Appeals Court Equity No. 73-464; 1974 Mass. App. Ct. Adv. Sh. 569; 1974 Mass. Adv. Sh. 1500; 211 N.E. 2d 568 (1974) (Further appellate review denied)

Michael W. Albano v. Jordan Marsh Company,
SJC No. 036 Law; 75 Mass. Adv. Sh. 1405;
327 N.E. 2d 739 (1975)

DEFENDANT JORDAN MARSH COMPANY
By: FREDERICK S. PILLSBURY

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS: SUPERIOR COURT
No. 123-384

MICHAEL. W. ALBANO

v.

[Title omitted in printing.]

Plaintiff's Affidavit in Opposition to Motion for Summary Judgment.

The first reason given by the defendant in this motion is the Statute of Limitations. These are the facts: On December 10, 1966, in compliance with the lease between the parties, the plaintiff in writing, under Article XXXV of the lease, and by Registered Mail, requested an extension of time for performance because (in addition to other reasons) of certain taxpayers' petitions against the Outer-Belt and therefor against the shopping center; under which petitions the City of Springfield and the plaintiff had been restrained from going forward. The request was denied by Jordan Marsh on December 23, 1966. Thereafter, on December 5, 1968 by writ given to the sheriff for service the present action, No. 123-384 was commenced. The sheriff made a chip attachment on December 6, 1968 and served Jordan Marsh on December 9, 1968 all within two years from December 10, 1966. The Statute of Limitations does not apply. Suffolk Equity No. 86858 filed prior to this action had been decided in favor of the plaintiff by the Supreme Court which had awarded costs. The defendant also raised the defense of estoppel for the first time, but the plaintiff in

his replication pointed out that Equity No. 86858 was a petition for declaratory relief to have a Court in Equity set forth the rights of the parties as to the question of "an extension of time" and was not an election of remedies, did not seek damages, and that after the finding for the plaintiff in the Superior Court, Equity No. 86858 on September 1, 1967, the plaintiff offered to go forward by Registered Mail but the defendant ignored the letter and the following month appealed.

During the pendency of Hampden No. 123-384, the plaintiff filed a petition of Equity Suffolk No. 93154, for declaratory relief seeking specific performance by Jordan Marsh. The defendant filed a plea in abatement. At the hearing, the parties agreed that Count VI of this Case No. 123-384, because it was in Tort, was to stand depending on the final decision of Judge Brogna. That the parties would go forward on Suffolk No. 93154 because it was in contract and involved contract law. See pages 7 and 8 (Bill of Exceptions) SJC No. 036 Law. On April 12, 1973, after the decision in favor of Jordan Marsh as to specific performance (Suffolk No. 93154) Judge Brogna ruled: "*In connection with court action dated July 14, 1971, entered in the Suffolk Equity Suit as paper no. 5 with reference to Count Six and in the proceedings entitled Michael W. Albano v. Jordan Marsh Co., Hampden County Superior Court No. 123-384, it is ordered that the Plaintiff may proceed on said Count Six and further that said Count Six states a cause of action separate and apart from that suit (Suffolk Equity No. 93154)*" See page 9 (Bill of Exceptions) SJC No. 036 Law.

The defendant in its motion in general language overlooks the decision of Judge Brogna, sets up the question of Res Judicata or collateral estoppel on a matter, which has already been up to the Supreme Court, and in a blanket statement contends "there is no genuine issue as to any

material fact . . . that was not, or in law might not have been litigated in the prior proceedings."

In the first place, the parties had agreed to try Suffolk No. 93154 first because it involved contract law and leave the Tort part until later. The plaintiff in Suffolk No. 93154 was only interested in specific performance and consequently concentrated on that. In the second place, the facts set forth in Count Six were not to be made a part of the Equity petition. (See page 15 of the plaintiff's Brief in SJC No. 036 Law). *Certain issues* not having submitted to the Court by the parties, findings on those issues do not bind the plaintiff. (See 50 Corpus Juris Secundum, Section 232 at page 223).

Count Six, See page 12, (Bill of Exceptions) SJC No. 036 Law, describes the action of the defendant as to the other tenants and as to the project which could not have been introduced in evidence in an action for specific performance. Count Six contains the words "*that this and other conduct by the defendant made it impossible for the plaintiff to honor his obligations under the existing leases*". See Page 12, (Bill of Exceptions) SJC No. 036 Law. As to "this and other conduct by the defendant" the plaintiff attaches the following affidavit as to evidence he will introduce that will create positive issue of fact for a Jury to decide.

The plaintiff states that Allied Stores, Inc., of New York is the parent company of the Jordan Marsh Company of Boston, the defendant, and the guarantor of its lease. That Andrew L. Murphy was the Executive Vice-President of said Allied Stores, Inc. in charge of all lease negotiations in behalf of Jordan Marsh. That said Andrew L. Murphy made the final decisions in connection with said lease negotiations and said project. That the Jordan Marsh Company previous thereto directed the plaintiff to do business

with said Andrew L. Murphpy and stated that Jordan Marsh would abide by his decisions. In connection with the conduct of the defendant as to the other tenants, the plaintiff will introduce evidence which will tend to prove, and from which a Jury could find, that the defendant interfered with the other leases of the plaintiff and with the project belonging to the plaintiff, bringing about a collapse of the shopping center. That the plaintiff will introduce evidence tending to prove, and from which a Jury could find, that the defendant and its parent organization Allied Stores, Inc. of New York, entered into a secret arrangement and planned to deprive the plaintiff of his shopping center project and to secure the same at a nominal cost for their own profit to the damage of the plaintiff. That the plaintiff will introduce evidence which will tend to prove, and from which a Jury could find, that the plaintiff suffered extensive damages, loss of time, years of great effort, and mental anguish.

The Pending Case Hampden No. 123-384 In Tort, Involves Issues of Fact.

A "Summary of Judgment" may be loosely defined as a Judgment ordered by a court in a case pending before it when as a matter of law the proceedings show there is *no genuine issue* between the parties. Where there is a genuine disputed issue of fact, the issue must be resolved in a trial.

26 Legalite 516

Kesler v. Pritchard 362 Mass. 132 1972 AS1205 holds it was improperly allowed where affidavit of defense revealed the existence of a genuine issue of fact.

In *Merrow v. McLaughlin, 28 Mass. App. Dec. 120*; (15 Legalite 278) Judgment was ordered for defendant. A Summary Judgment cannot be entered where intent, knowledge or motive is an essential of the defense.

In support of Count VIII of his declaration, the Plaintiff offers the case of *George F. Willett v. Herrick, et als, 242 Mass. 471 at 474.* That case holds: A CONSPIRACY MAY BE UNLAWFUL EITHER BY MEANS OF ITS PURPOSE OR BY REASON OF THE MEANS EMPLOYED TO ACCOMPLISH ITS PURPOSE. "The gist of the cause of action set out in that declaration (Willett v. Herrick) was the depriving of the plaintiffs of their property by a series of wrongful acts of the defendants acting in concert and in accordance with a scheme to defraud."

The declaration in that case (page 475) averred that in July 1918, the defendants entered into a secret combination and conspiracy, by illegal and fraudulent means to deprive the plaintiffs of their shares in the Felt and the Green companies, to secure the same at a nominal cost for their own profit and did effect the purpose of the conspiracy by acquiring practically all the plaintiffs' shares in the companies in question to the value of $10,000,000 without substantial cost to themselves, and this was done by wrongful means.

What is the basis for this Motion for Summary Judgment? It relies on the amendment to the defendant's answer allowed by Judge Moriarty on October 17, 1973. The allowance of the motion to amend the defendant's answer was merely interlocutory as the Supreme Court held later. It was the memorandum and order filed with the case that troubled the plaintiff. That memorandum and order attempted to decide the Tort case against the plaintiff and the plaintiff could foresee the Motion for Summary Judgment if Judge Moriarty's memorandum and Order were allowed to

stand unchallenged. The plaintiff had to obtain an expression from the Supreme Judicial Court.

Consequently, after every effort to bring the matter up to the Supreme Court under normal procedures had been exhausted, the plaintiff consulted with a most respected member of the Suffolk County Supreme Court clerk's office and was advised that the only avenue left seemed to be Chapter 211, Section 4A of the General Laws. Thus the plaintiff brought the petition which has become the basis of the Supreme Court decision (SJC 036 Law).

The Bill of Exceptions under said petition and the briefs of the parties recite the complete story. The plaintiff did not agree with Judge Moriarty and in his brief he cited two decisions which were decided by the Supreme Court subsequent to those cited by Judge Moriarty in his memorandum and Order (See page 4 of the plaintiff's brief filed in SJC No. 036 Law).

Nor did the Supreme Judicial Court agree with Judge Moriarty's memorandum and Order. If it had, its decision would have so stated. Instead, after holding the case for a period of approximately four months from date of argument, it decided in effect that the allowance by Judge Moriarty of the "Motion to Amend Defendant's Answer" was merely interlocutory. On page 6 of its decision, it held "Whether governed by the former law or by the more recent Massachusetts Rules of Civil Procedure and Massachusetts Rules of Appellate Procedure, a litigant is not entitled to piecemeal appellate review of unreported interlocutory orders or rulings of a trial Judge by the full court of this court or of the Appeals Court".

On the same page, the Supreme Court said: "It is more important to preserve it (the rule of practice as to when exceptions may be presented for final decision) than to break in upon it for the purpose of doing what may appear to be

desirable in a single case and thereby work confusion in many other cases".

On Page 7, the Supreme Court said: "The single Justice correctly denied the petition as an indirect and premature attempt to obtain appellate review of an unreported interlocutory order or ruling. The attempt has only served to delay trial which was probably obtainable in June or September 1974, under the Superior Court Order of October 17, 1973".

Thus, the Supreme Court had spoken: Judge Moriarty's Memorandum and Order and his allowance of the motion to amend the defendant's answer was not final.

We now consider the position of the defendant in connection with its Motion for Summary Judgment. On Page four of its brief in SJC No. 036 Law, last three lines *the defendant argued "the allowance of the amendment to answer is not decisive of the case but merely allows an affirmative defense to be set up which must be proved"*; on page five (5) the defendant argues "Under the new Massachusetts Rules of Civil and Appellate Procedure, the appeal is also premature since there has been no entry of Judgment.

Now the defendant seeks by its Motion for Summary Judgment to make the interlocutory decision of Judge Moriarty, FINAL, without a trial and without the setting up of an affirmative defense which must be set up and proved.

Respectfully submitted,

MICHAEL W. ALBANO,
PLAINTIFF

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS: *March 18, 1976*

Personally appeared the above MICHAEL W. ALBANO to me known, and took oath that the above statements are true, before me.

SALLY L. ATKINSON,
Notary Public

My commission expires:
May 7, 1980

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

[Title omitted in printing.]

Decision Allowing Motion for Summary Judgment.

CONCLUSION OF LAW.

Jordan maintains that the pending tort action is barred by the findings in the declaratory judgment case. It is generally well established that where a question of fact essential to a judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action even though the subsequent action is on a different cause of action. *Mackintosh v. Chambers*, 285 Mass. 594 (1936).

Our Supreme Judicial Court recently has extended this proposition. In the case of *Homeowners Federal Savings and Loan Association v. Northwestern Fire and Marine Insurance Company*, 354 Mass. 448, the court held that a plaintiff in a subsequent action was bound by a finding made in a prior action brought by it, even though the defendant in the second action had not been a party in the prior suit, and *even though the facts found had not been essential to the court's decision in the first suit.* (Emphasis added.) The Supreme Judicial Court stated in its decision that the justification for its extended application of collateral estoppel was that "since the plaintiff has had his day in court on the issue in a form of his own choosing, litigating should come to an end." The Superior Court Judge in permitting Jordan to amend its answer to assert *res judicata* made the following observations:

> "In my opinion the defendant in this case should have an opportunity to plead and prove any factual determinations which were made in the prior equity suit to the extent that they may be relevant in this action. The prior suit was brought by the plaintiff in a forum of his own choosing. The relief sought was extremely broad [Footnote omitted]; the trial was lengthy and complete; and the findings were exhaustive and detailed. Public policy as well as the rights of the defendant require that the plaintiff be bound by those findings unless they are stricken or reversed on appeal. It follows that the defendant's motion to amend its answer should be allowed."

The test, therefore, is not the form in which the action is set, but the substantive rights alleged. *Ratner v. Rockwood*

Sprinkler Co., 340 Mass. 773 (1960). The statement of a different form of liability is not a different cause of action for purposes of application of collateral estoppel principles if it grows out of the same transaction, act or agreement, and seeks relief for the same wrong. *Mackintosh v. Chambers*, 285 Mass. 594, 596 (1934). The facts determined in earlier proceedings will be conclusive in later proceedings. *Home Owners Federal Savings and Loan Ass'n. v. Northwestern Fire and Marine Insurance Co., 354 Mass. 448 (1968).*

In this court action Albano alleges that as a result of the Jordan lease he obtained other valuable leases, including a lease with Filene's, that Jordan knew of the existence of the other leases and lease commitments, and that they all were contingent on Jordan fulfilling its obligation under the lease; that Jordan wrongfully refused to grant an extension of time for preparation of its store, knowing that the denial of the extension would interfere with Albano's fulfillment of the other leases; that Jordan let it be known throughout the shopping center industry that it would not grant an extension, thereby interfering with the other leases; that Jordan's conduct made it impossible for Albano to honor his obligations under his other leases; that Jordan's conduct was malicious and unjustified, and caused Albano to lose the other leases and the project to fail. For all of this claimed tortious conduct, Albano claims damages as he did in the prior suit. An examination of Judge Lynch's findings as well as the transcript and other documents presented in connection with the motion satisfy me that the facts essential to liability in the tort action have been found adversely to Albano. To the extent that his tort action relies on an allegation that Jordan acted wrongfully and maliciously in refusing to grant an extension of time, the allegation fails since the declaratory judgment decree expressly found that Jordan acted at all times in good faith. To the extent that

Albano's difficulties were caused by the suit over the Highway, caused inferentially by Jordan, the allegation fails since the declaratory judgment action found that Jordan played no part in instigating this litigation. To the extent that the tort action depends on Albano's assertion that Jordan caused the other tenants to abandon their leases, the action fails since the prior action has found that Jordan played no part in causing the other tenants to cancel their leases. To the extent that the action rests on Jordan's alleged interference with the lease with Filene's, the action fails since it has been found that Jordan played no part in Filene's abandoning its lease. To the extent that the action rests on the allegation that Jordan "let it be known throughout the shopping center industry that it would not grant an extension," the action fails, in my opinion, because of the finding in the prior suit that Jordan acted throughout in good faith. I thus can see no basis for the maintenance of the tort action on any of the assertions pleaded therein.

It appears that Albano agrees with this. He was concerned with the amendment of the answer to permit the defense of *res judicata*. After the amendment was allowed, he applied to a single Justice to set it aside. When the single Justice denied his request, he appealed to the full court through a Bill of Exceptions. The Supreme Judicial Court decided adversely to him. Significantly, in his brief to the full court on the question of *res judicata*, he made the following statement:

> "If the amendment granted by Judge Moriarty is allowed to stand, this is what will happen at the time of trial. The plaintiff will introduce his testimony, exhibits and evidence of malice; the trial will take one week; then the plaintiff will rest. Mr. (Justice) Pillsbury will bring a motion for directed verdict. In

support of said motion, he will enter certified copies of the findings, the rulings, and final decree of Judge Lynch. The trial judge will allow the motion for directed verdict. He will accept the final decree in Equity 9314 as *res judicata* because of the amendment granted by Judge Moriarty."

Thus, it appears to me that Albano recognizes that the findings in the prior declaratory judgment suit were determinative of his tort action.

MOTION TO AMEND.

Albano seeks to amend his tort action to assert an additional count which he maintains is supportive of the malicious interference suit. I deny the requested amendment. This suit has been pending for seven years and the plaintiff has had ample opportunity to assert all of his causes against the defendant. It seems grossly unfair to me to permit an amendment which could have been pleaded long before on the eve of trial in the face of a motion for summary judgment. I am troubled also by the pleading of the proposed amendment. The gravamen of the proposed wrong is "mysterious" at best. In substance, I believe it pleads an additional basis for asserting that Jordan maliciously interfered with the plaintiff's business relationships. To the extent that it asserts such a cause, it rests on some allegations that are pleaded in the original tort count. I have found that this count is foreclosed by the rulings in the prior case.

In connection with the proposed amendment, Albano has made no offer of proof by way of affidavit or otherwise of facts supportive of the proposed new count. Without this,

and realizing that the addition of the new count will ignite a chain of litigative events, including responsive pleadings and discovery, I can see the end of this particular litigation propounded indefinitely. I also am troubled by being unable to plug the cause pleaded in the proposed amendment into any recognized cause of action. Its amorphous content flies in the face of the requirements of Rule 8 requiring a short and plain statement of a claim.

I, therefore, find with regard to the proposed amendment that it is pleaded too late, if permitted would prejudice the defendant, and is unsupported by factual underpinnings by way of affidavit or otherwise. I, therefore, in what I believe to be an appropriate exercise of discretion, deny it.

ORDER FOR JUDGMENT.

I request that the Clerk's office, in keeping with these findings, enter a judgment for the defendant on its motion for summary judgment based on an examination of all of the pleadings in this action, and an examination of all of the documents set out in the stipulation between the parties in connection with the motion, including the transcript of testimony in the prior suit. The motion to amend is denied.

Entered: April 13, 1976.

JOHN M. GREANEY,
Associate Justice

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT.

MICHAEL W. ALBANO

vs.

JORDAN MARSH COMPANY.

HALE, C.J. The plaintiff appeals from the allowance of the defendant's motion for summary judgment on the ground of estoppel by judgment.

There has been much litigation between the parties, all of it based on the efforts of the plaintiff to develop a shopping center in the Springfield area. A more detailed account of those efforts may be found in *Albano* v. *Jordan Marsh Co.* 2 Mass. App. Ct. , - (1974)[a] (hereinafter *Albano I*), further appellate review denied, Mass. (1974).[b] See also *Albano* v. *Jordan Marsh Co.* 354 Mass. 445 (1968); *Albano* v. *Jordan Marsh Co.* Mass. (1975),[c] (hereinafter *Albano II*).

The sole surviving count in the present action is in tort, alleging malicious interference with the plaintiff's business relationships; in substance the plaintiff alleges that the defendant (which was to be the prime, or "anchor," tenant in the proposed shopping center) wrongfully induced other tenants (smaller retail stores) to break their leases with the plaintiff. The present action was begun in 1968, and thus

[a] Mass. App. Ct. Adv. Sh. (1974) 569, 569-574.

[b] Mass. Adv. Sh. (1974) 1500.

[c] Mass. Adv. Sh. (1975) 1405.

actually predates *Albano I*, a "petition for declaratory judgment" filed in 1971, tried in 1973, and affirmed on appeal in 1974. After the entry of the 1973 decree in the Superior Court in *Albano I* the defendant was permitted to amend its answer in the present action to assert the defense of res judicata. Because *Albano I* had been appealed, however, the present action was placed on the list of nontriable cases until resolution of that appeal. The plaintiff's unsuccessful efforts to obtain review of that interlocutory disposition of the present action are chronicled in *Albano II*, *supra*.

On March 12, 1976, the defendant filed a motion for summary judgment in the present action on the ground of "res judicata or collateral estoppel." The plaintiff filed an affidavit in opposition thereto. The judge allowed the motion and filed a statement of "Conclusions of Law" pertinent to his decision. In short, he ruled that the facts essential to the maintenance of the present action in tort had been found adversely to the plaintiff in *Albano I*.[1]

[1] The judge stated: "To the extent that his tort action relies on an allegation that Jordan acted wrongfully and maliciously in refusing to grant an extension of time, the allegation fails since the declaratory judgment decree expressly found that Jordan acted at all times in good faith. To the extent that Albano's difficulties were caused by the suit over the Highway, caused inferentially by Jordan, the allegation fails since the declaratory judgment action found that Jordan played no part in instigating this litigation. To the extent that the tort action depends on Albano's assertion that Jordan caused the other tenants to abandon their leases, the action fails since the prior action has found that Jordan played no part in causing the other tenants to cancel their leases. To the extent that the action rests on Jordan's alleged interference with the lease with Filene's, the action fails since it has been found that Jordan played no part in Filene's abandoning its lease. To the extent that the action rests on the allegation that Jordan 'let it be known throughout the shopping center industry that it would not grant an extension,' the action fails, in my opinion, because of the finding in the prior suit that Jordan acted throughout in good faith. I thus can see no basis for the maintenance of the tort action on any of the assertions pleaded therein."

The plaintiff argues that the defense of res judicata is not applicable to the present action because the cause of action involved here — unlawful interference with contractual relations — is distinct from that in *Albano I*, which sought a determination of the rights of Albano and Jordan Marsh under a lease. Thus, he argues, it makes no difference that certain facts may have been found in *Albano I* which are relevant to the present action (see fn. 1, *supra*), because those findings were not essential to the subject matter of *Albano I* and hence are not "adjudicated" facts for res judicata purposes. Cf. *Cambria* v. *Jeffery*, 307 Mass. 49, 50 (1940); *Wayland* v. *Lee*, 325 Mass. 637, 641 (1950).

In our opinion, however, the method of analysis propounded by the plaintiff is not, under modern authority, the correct one. The question is not whether a particular finding was "essential" to the judgment in the prior action, but rather whether that finding has been "the product of full litigation and careful deliberation." *Home Owners Fed. Sav. & Loan Assn.* v. *Northwestern Fire & Marine Ins. Co.* 354 Mass. 448, 455 (1968). See Restatement (Second) of Judgments § 68, Reporter's Note to comment h, at 167 (Tent. Draft No. 1, 1973). Thus, the fact that the two cases involve the application of different principles of law (see *Sandler* v. *Silk*, 292 Mass. 493, 498-500 [1935]; *Boylston* v. *McGrath*, 348 Mass. 640, 643-644 [1965]) is not decisive. The ordinarily conclusive effect of a judgment in a former action cannot be circumvented merely by characterizing a second action differently from the first. "Two actions are not necessarily for different causes of action simply because the theory of the second would not have been open under the pleadings in the first." *Mackintosh* v. *Chambers*, 285 Mass. 594, 597 (1934). Compare *Siegel* v. *Knott*, 318 Mass. 257 (1945); *Wishnewsky* v. *Saugus*, 325 Mass. 191, 195 (1950); *Forman* v. *Wolfson*, 327 Mass. 341,

cert. den. 342 U.S. 888 (1951); *Ratner* v. *Rockwood Sprinkler Co.* 340 Mass. 773 (1960); *Dwight* v. *Dwight*, Mass. , - (1976).[d]

It is necessary, then, to look beyond the captions of the pleadings and examine the entire record of the first case in order to determine whether the issues involved in the present action were actually raised, litigated, and carefully deliberated in the first case. *Home Owners Fed. Sav. & Loan Assn.*, *supra*. Restatement (Second) of Judgments § 76 and comments b and c (Tent. Draft No. 3, 1976). We conclude (as did the judge below) that they were. An examination of the pleadings in *Albano I*[e] discloses that the plaintiff specifically alleged that "[a]s a result of [a] . . . course of action by [Jordan Marsh] . . . other tenants which [Albano] . . . had secured began to withdraw from the project." In its answer the defendant specifically alleged that Albano had "disabled himself from performing [under the lease] by allowing the cancellation of essential leases which he had obtained . . ." and that "as a result of his own actions [Albano] . . . rendered his performance impossible . . .." Those respective allegations, we think, served to raise in *Albano I* the precise issue now involved. Thus, the court's finding in *Albano I* that "Jordan played no part in inducing these tenants to leave" (2 Mass. App. Ct. at [f]), incorporated in the final decree (*id.* at , n. 1[f]), and affirmed by this court on appeal (*id.* at and n. 2[g]), is "conclusive"

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[d] Mass. Adv. Sh. (1976) 2708, 2713-2715.

[e] The record and briefs on appeal in *Albano I*, including the pleadings, findings and final decree, were introduced as an exhibit in the present action.

[f] Mass. App. Ct. Adv. Sh. (1974) at 572.

[f] Mass. App. Ct. Adv. Sh. (1974) at 574, n. 1.

[g] Mass. App. Ct. Adv. Sh. (1974) at 575, and n. 2.

(Restatement [Second] of Judgments § 76, *supra*) for the purposes of res judicata and collateral estoppel.[3] The same conclusive effect must be given to the other findings set forth in fn. 1, *supra*. We see nothing in the plaintiff's affidavit in opposition to the motion for summary judgment in the present action that establishes with requisite specificity the existence of any fact not already litigated.

We attach no special significance to the fact that the primary object of *Albano I* may have been to establish the rights of Albano and Jordan Marsh under their lease; nor do we attach significance to the apparent agreement of the parties to postpone trial on the present action until the resolution of *Albano I*. As we see it, the plaintiff saw fit to open up the issues involved in the present action in *Albano I* and to litigate them at trial and on the earlier appeal. He cannot now insist that those issues should be relitigated because they were somehow not central to the relief sought in *Albano I*. If the plaintiff had had that concern during the course of *Albano I*, he could have filed appropriate motions to remove those issues from *Albano I*. Such a course of action would have been especially appropriate because of the unusual circumstance that the present action (i.e., the "second" action for res judicata purposes) had been filed and was actually pending at the time *Albano I* (the "first" action for res judicata purposes) was commenced. Thus the precise cause of action on which the plaintiff intended to rely in his "second" action had already been set forth.

[3] No question appears to have been raised in the lower court or on appeal that any of the several tenants (all named) in the declaration in the present action are different from the "tenants" who were referred to (but not specifically named) in *Albano I*.

The long and tortious course of litigation between the parties illustrates the interests to be served by avoiding piecemeal litigation. See *Albano II* at - .[h] See also *Grunberg* v. *Louison*, 343 Mass. 729 (1962). The lower court acted wisely in permitting the defendant to amend its answer to assert the defense of res judicata (see *Willett* v. *Webster*, 337 Mass. 98, 100 [1958]) and properly in allowing the motion for summary judgment based on that ground.

Judgment affirmed.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT.

Orders.

The Supreme Judicial Court has made the following orders with respect to applications for leave to obtain further appellate review:

June 28, 1977

Denied:

MICHAEL W. ALBANO *vs.* JORDAN MARSH COMPANY. Reported below: Mass. App. Ct. Adv. Sh. (1977) 483.

[h] Mass. Adv. Sh. (1975) at 1410-1411.